IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF ALLIED CHEMICAL CORPORATION *ET AL.*, FOR LEAVE TO INTERVENE AND BRIEF FOR ALLIED CHEMICAL CORPORATION, *ET AL.*, IN OPPOSITION

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November 22, 1978

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MOTION OF ALLIED CHEMICAL CORPORATION *ET AL.*, FOR LEAVE TO INTERVENE

Allied Chemical Corporation *et al.*,[1] move for leave to intervene in this action pursuant to Rule 35 of the Supreme Court Rules. In support thereof, Allied Chemical Corporation *et al.*, state as follows:

1. This motion is made necessary solely because the United States Court of Appeals for the District of Columbia Circuit dismissed this action below before it

[1] Allied Chemical Corporation; Canadian Industries, Ltd.; Diamond Shamrock Corporation; Dow Chemical USA; Ethyl Corporation; FMC Corporation; Hooker Chemicals & Plastics Corp.; IMC Chemical Group; Monsanto Company; Olin Corporation; Pennwalt Corporation; Shell Chemical Co.; Stauffer Chemical Company; and Vulcan Materials Company.

ruled upon the Motion For Leave To Intervene of Allied Chemical Corporation *et al.*, which had been timely filed with that Court. The dismissal of the action rendered the Motion moot, and it was denied as such.

2. The proceeding before the United States Court of Appeals for the District of Columbia Circuit was instituted by a Petition for Review of an Order of the Interstate Commerce Commission in Ex Parte No. 343, *Nationwide Increased Freight Rates and Charges, 1977*. Allied Chemical Corporation, *et al.* were parties to the Commission proceeding. The order of the Commission in the proceeding limited freight rate increases on chlorine and caustic soda to two percent rather than permitting an increase of five percent as requested by the Nation's railroads. In addition, the Commission's order required amounts already charged in excess of the allowed two percent to be refunded to the shippers of chlorine and caustic soda. Allied Chemical Corporation *et al.* are substantial shippers of chlorine and caustic soda, and, therefore, their interests were substantially affected by the action in the Court of Appeals.

3. Allied Chemical Corporation *et al.* timely filed a Motion For Leave To Intervene in the Court of Appeals action pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Section 2348 of the Judicial Code. (28 U.S.C. 2348). A copy of that Motion is attached hereto as Appendix A. In addition, Allied Chemical Corporation *et al.* filed at the same time a Memorandum In Opposition To Petitioners' Motion For Stay Pending Review, a Motion To Dismiss, and a Memorandum In Support Of The Motion To Dismiss. The Interstate Commerce Commission also filed a Motion To Dismiss.

4. Section 2348 of Title 28 of the United States Code states in relevant part:

> The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order.

5. The Court of Appeals granted the Motion To Dismiss filed by the Interstate Commerce Commission. When it did so the Motion For Leave To Intervene of Allied Chemical Corporation *et al.* was before the Court. If the Court had not granted the Motion To Dismiss there is no question that in view of 28 U.S.C. 2348, the Court would have granted the Motion For Leave To Intervene. By granting the Motion To Dismiss, however, it rendered moot the Motion For Leave To Intervene. It, therefore, denied the Motion as moot. A copy of the Court's order is attached hereto as Appendix B.

WHEREFORE, in view of the circumstances involved herein, and in view of the provisions of 28 U.S.C. 2348, Allied Chemical Corporation *et al.* move this Court for leave to intervene in this proceeding in support of respondents.

Respectfully submitted,

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November 22, 1978

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 78-1636

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and THE UNITED STATES OF AMERICA, *Respondents.*

Motion For Leave To Intervene Of:

ALLIED CHEMICAL CORPORATION
BASF WYANDOTTE CORPORATION
CANADIAN INDUSTRIES, LTD.
DIAMOND SHAMROCK CORPORATION
DOW CHEMICAL USA
ETHYL CORPORATION
FMC CORPORATION
HOOKER CHEMICALS & PLASTICS CORP.
IMC CHEMICAL GROUP
MONSANTO COMPANY
OLIN CORPORATION
PENNWALT CORPORATION
PPG INDUSTRIES, INC.
SHELL CHEMICAL COMPANY
STAUFFER CHEMICAL COMPANY
VULCAN MATERIALS COMPANY

The above-captioned companies move for leave to intervene in this action pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Section 2348 of the Judicial Code. (28 U.S.C. 2348) In support thereof, the above-captioned companies state as follows:

1. This proceeding was instituted by a Petition for Review of an Order of the Interstate Commerce Commission served June 29, 1978, in Ex Parte No. 343, *Nationwide Increased Freight Rates and Charges, 1977.*

2. The above-captioned companies were parties to the above proceeding which the Petitioners seek to have reviewed in this proceeding. The order of the Commission here on review limits freight rate increases on chlorine and caustic soda to two percent rather than permitting an increase of five percent requested by Petitioners to remain in effect. In addition, the Commission's Order requires amounts charged in excess of the allowed two percent increase to be refunded to shippers of chlorine and caustic soda. The above-captioned chemical companies are substantial shippers of chlorine and caustic soda, and, accordingly, their interests are substantially affected by this proceeding.

3. Section 2348 of Title 28 of the United States Code permits intervention in review proceedings by persons party to the action before the Interstate Commerce Commission whose interests will be affected by the outcome of the review.

WHEREFORE, Allied Chemical Corporation, BASF Wyandotte Corporation, Canadian Industries, Ltd., Diamond Shamrock Corporation, Dow Chemical USA, Ethyl Corporation, FMC Corporation, Hooker Chemicals & Plastics Corp., IMC Chemical Group, Monsanto Company, Olin Corporation, Pennwalt Corporation, PPG Industries, Inc., Shell Chemical Co., Stauffer Chemical Company, Vulcan Materials Company, respectfully move this Court for leave to intetrvene in this proceeding in support of respondent.

Respectfully submitted,

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July 21, 1978

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 78-1636

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents

Filed July 27, 1978

Order

On consideration of the motions of

1. National Association of Recycling Industries, Inc.,
2. The Fort Howard Paper Company of Green Bay, Wisconsin
3. Allied Chemical Corporation, et al.,
4. PPG Industries, Inc.,

for leave to intervene and it appearing that an order was filed herein on July 25, 1978 granting respondents' motion to dismiss, and denying petitioner's motion for stay as moot, it is

ORDERED that aforesaid motions for leave to intervene are denied as moot.

GEORGE A. FISHER, CLERK
FOR THE COURT

/s/ DANIEL M. CATHEY
Daniel M. Cathey
First Deputy Clerk

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UNITED STATES OF AMERICA and
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR ALLIED CHEMICAL CORPORATION, *ET AL.*, IN OPPOSITION

QUESTION PRESENTED

Is an order of the Interstate Commerce Commission issued in a general revenue proceeding reviewable insofar as that order allows or disallows a portion of the general revenue increase as it applies on certain specific commodities?

STATEMENT OF THE CASE

On September 26, 1977, the Nation's railroads petitioned the Interstate Commerce Commission for authority to file a general revenue increase of five percent. In an order served September 29, 1977, the Commission authorized the filing of such a general increase tariff subject to protest and possible suspension and/or investigation. In addition, the Commission required that the increase tariff contain a refund provision in the event that some or all of the general increase was ultimately found to be unreasonable.

Following the submission of shipper protests and railroad replies thereto, and after oral argument, the Commission, on November 10, 1977, issued an order allowing the five percent increase to go into effect subject to certain exceptions. The Commission ordered that the increase on feed grains from Midwestern origins to New England points should be no greater than three percent, and ordered no increase on certain wood chip rates. In addition, the Commission ordered an investigation into the lawfulness of the general increase on seven specified commodity groups. The investigation into the lawfulness of the rate increase on the seven commodity groups was based upon the Commission's analysis of the ratios of revenues to variable costs on those commodity groups. The Commission analysis indicated that those commodity groups were already bearing extremely high railroad freight rates.

Pursuant to the Commission's procedural schedule the railroads and shippers, including Allied Chemical Corporation, *et al.*, submitted substantial testimony bearing upon the lawfulness of the increases. On June 29, 1978, the Commission issued its decision and order in which it found that the railroads had failed to justify

the full five percent increase on commodities under investigation. The Commission held as to the commodities under investigation:

> The majority of the commodities will receive 3 percent with the exception of sodium alkalies, industrial gases, and recyclables. This increase will grant relief to shippers by limiting the increase on these commodities which are already subject to high rate/cost ratios. It should be noted that the proposed 5-percent increase, if authorized, would result in a disproportionate contribution by these commodities, a result not justified by the evidence in this proceeding.
>
> * * * *
>
> In the case of sodium alkalies and industrial gases, shippers have provided persuasive evidence to warrant limiting the increase on these commodities to 2 percent. (Commission Order of June 29, 1978, p. 21, Petitioners App. A, p. 36a)

On July 10, 1978, the railroads filed a petition for review, and a motion for stay of the Commission's order in the United States Court of Appeals. The Commission, Allied Chemical Corporation, *et al.* and other shippers filed motions to dismiss and opposed the issuance of a stay order. On July 25, 1978, the Court of Appeals granted the Commission's motion to dismiss.

ARGUMENT

A. The Commission's Long-Standing Practice Of Granting Or Refusing To Grant Increases On Specific Commodities In General Revenue Proceedings Has Consistently Been Held Non-Reviewable By The Federal Courts.

The Petition For A Writ Of Certiorari alleges that the decision of the Commission constitutes a substantial departure from past Commission practice, and creates novel issues of law. Such contention has no

merit. The Commission has long considered the lawfulness of general rate increases insofar as they apply to specific commodities, and the courts have consistently refused to review the Commission's conclusions and orders in this regard. The instant case is but another in a long line of cases, and presents no conflict among the circuits and no conflict with decisions of this Court.

In Ex Parte No. 103, *Fifteen Per Cent Case, 1931,* 178 I.C.C. 539 (1931) the Nation's railroads claimed that an emergency situation existed, and requested authority to make a general rate increase of 15 percent on all commodities. In its decision, the Commission held:

> It is similarly our conclusion that such an increase would raise the rates upon many kinds of traffic above a just and reasonable level. This latter conclusion applies particularly to the products of agriculture, including livestock. (178 I.C.C. 577)

The Commission went on to disallow any increase on numerous agricultural commodities. (178 I.C.C. 587)

In Ex Parte No. 115, *Emergency Freight Charges, 1935,* 208 I.C.C. 4 (1935) the Nation's railroads sought a general increase in freight rates. Shippers of numerous commodities, most notably coal, requested that the Commission suspend the increases on their specific commodities. The Commission declined to suspend the increases and certain coal shippers appealed. In the leading case of *Algoma Coal & Coke* v. *United States,* 11 F.Supp. 487 (E.D. Va. 1935) a three-judge district court held that shippers cannot sue with "[t]he object * * * to enjoin putting [particular] increased rates into effect," 11 F.Supp. at 491, but rather must exhaust the statutory procedures for contesting the reasonableness of particular rates even though they have been raised

as a result of a Commission-authorized general rate increase.

In Ex Parte No. 175, *Increased Freight Rates, 1951,* 297 I.C.C. 17 (1955) the Commission held, after a long investigation, that certain general increases as they applied on coal were reasonable. Certain coal shippers appealed, and in *Koppers Company* v. *United States,* 132 F. Supp. 159 (W.D. Pa. 1955) a three-judge court again held that the Commission's order was non-reviewable.

In *Proposed Increased Refrigeration Charges,* 297 I.C.C. 505 (1956) the railroads asked for general increases in refrigeration charges. Shippers objected, a hearing was held, the increases were permitted, and shippers appealed. Once again in *Florida Citrus Comm'n* v. *United States,* 144 F.Supp. 517 (N.D. Fla. 1956); aff'd *per curiam,* 352 U.S. 1021 (1957) a three-judge district court held that the Commission's order was non-reviewable and this Court affirmed.

In Ex Parte No. 206, *Increased Freight Rates, Eastern, Western and Southern Territories, 1956,* 300 I.C.C. 633 (1957) the Commission authorized general rate increases, but ordered hold-downs on several commodity groups. (300 I.C.C. 687-691) In Ex Parte No. 259, *Increased Freight Rates, 1968,* 332 I.C.C. 714 (1969) the Commission authorized general rate increases but ordered an investigation into the lawfulness of the proposed increases as they applied to specific commodities. The proceeding was structured in virtually the same fashion as the instant case. Following investigation, the Commission concluded that the increases were lawful on some commodities and unlawful on others. For example, the Commission concluded that rates on potash should not be increased the full amount re-

quested, but that rates on household and electrical appliances should bear the full increase requested.

In *Electronic Industries Ass'n* v. *United States,* 310 F.Supp. 1286 (D.D.C. 1970) aff'd mem. 401 U.S. 967 (1971) shippers of electronic appliances appealed the Commission decision in Ex Parte No. 259 allowing the full increase on two commodities. The shippers attempted to distinguish their case from *Algoma Coal & Coke, supra,* on the ground that in *Algoma* the Commission had declined to suspend or investigate the rate increases whereas in Ex Parte No. 259, the Commission had investigated the lawfulness of the general increases on their specific commodities. The Commission and the railroads filed motions to dismiss, and the three-judge district court granted the motions. This Court affirmed.

This case is in no way distinguishable from the *Electronic Industries* case. The railroads here seek a rule that if the Commission investigates a general rate increase as it applies to specific commodities and finds that the increase is lawful as to those commodities, the order is non-reviewable. They contend, on the other hand, that if the Commission finds the rates unlawful as to those commodities, the order is reviewable. Stated differently, if in the Ex Parte No. 259 case, the railroads had challenged the Commission hold-down on potash, the matter would be reviewable, but the challenged refusal to hold-down electronic appliances is not reviewable.

There is no question that Allied Chemical Corporation *et al.* could not have had the order of the Commission here in issue reviewed. Under *Electronic Industries, supra,* and *Council of Forest Industries of British Columbia* v. *I.C.C.,* 570 F2d 1056 (C.A.D.C. 1978) any attempt to appeal the Commission order granting

the two percent increase on industrial gases and sodium alkalies, would have been met, as shippers in the past have been met, with a successful motion to dismiss. Any rule permitting one side of a controversy to appeal while the other side may not, would be inequitable and illogical in the extreme.

B. The Nation's Railroads Have Failed To Exhaust Their Statutory And Administrative Remedies.

The only distinction between this case and cases like *Electronic Industries, supra,* and *Council of Forest Industries, supra,* is that the railroads rather than the shippers are seeking review. This, however, is a distinction without a difference.

The Nation's railroads are free, collectively or individually or in rate-making groups, to propose changes in rail rates on any commodity or commodity groups, between any origin and any destination. The Commission may review the lawfulness of such proposed changes on its own motion or upon complaint by interested parties. Any shipper seeking a change in an existing rate must file a complaint with the Commission, and be prepared to carry the burden of proving that the existing rate is unlawful. A railroad or group of railroads need only file the rate change with the Commission.[1]

As previously noted, *Electronic Industries, supra,* and similar cases are bottomed upon the proposition that the complaining shippers had failed to exhaust

[1] As will be discussed below, the provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210; 90 Stat. 31) have substantially increased the railroads' power to change individual rates.

their administrative remedies. In the present situation, the railroads have failed to exhaust their remedies. They need only file an increase on any rate or rates which they believe to be too low. To require shippers to file an administrative complaint before seeking judicial review while permitting railroads to obtain judicial review without even requiring them to change rates over which they have control would be unconscionable.

The railroad contention that the action of the Commission with respect to the commodity groups in issue is administratively final is incorrect. The Commission found that the railroads had failed to justify the proposed increases on these commodities, but it certainly did not foreclose the filing of individual rate adjustments nor did it decide the merits of any individual rate adjustment, or individual rate adjustment proceeding. This case is no more final than was the Commission decision in *Electronic Industries, supra.*

C. The Commission's Decision Herein Is In No Way Dependent Upon Its Discussion Of The "4-R Act."

The railroads contend that this proceeding involves questions of the first impression relating to proper interpretation of the ratemaking provisions of the Railroad Revitalization and Regulatory Reform Act of 1976, (Pub. L. 94-210; 90 Stat. 31). This contention lacks merit.

The Commission's discussion of the "4-R Act" provisions and purposes clearly indicates that it does not interpret the Act as prohibiting general rate increases, nor does the Commission conclude that the Act changes the railroad burden of proof in general increase proceedings. The Commission does observe that the "4-R Act" gives the railroads far more flexibility and freedom in establishing individual rates.

The conclusions of the Commission with respect to the specific commodity hold-downs ordered are in no way dependent upon any interpretation of the "4-R Act." The conclusions are based upon shipper evidence, or lack of railroad evidence with respect to those commodities in precisely the same manner as the Commission's decision a half century ago in the *Fifteen Per Cent Case, supra.* In its conclusions herein with respect to the specific commodities under investigation, the Commission held:

> We find that while respondents have generally justified the 5-percent increase based on their overall revenue need * * * they have failed to establish that the increase on the commodities under investigation are justified on the basis of the cost of providing the services in issue. This investigation was precipitated by the high rate/cost ratios exhibited by these commodities. In the context of this proceeding cost evidence is important in determining whether the increases on these commodities are just and reasonable. (Petition For Writ Of Certiorari, App. B, P. 35a)

The Commission went on to hold:

> We must reiterate that respondents' failure to discuss the relevant factors affecting the rate levels of these commodities in the context of the cost of providing the service was a fatal error in this proceeding, given the initial reason for investigating these commodities. (Petition For Writ Of Certiorari, App. B, p. 36a)

The Commission's decision was not based upon the "4-R Act," but, rather, followed well-established Commission precedent. The discussion of the "4-R Act" provisions simply points out that the remedy of the railroads to increase individual rates is now greater than it was before the "4-R Act" was enacted by Congress. Stated differently, since the railroads have the ability to change any rate on any commodity that they feel is too low, and since the "4-R Act" clearly increases that ability, the railroads have no more right to judicial review of general increase orders as they apply to specific commodities than do shippers.

If the Commission's decision had said exactly the same things with respect to the "4-R Act," it still could have held on the basis of evidence presented that the five percent increase was justified. If that had occurred, the railroads would not have filed this action, and the shippers would have been precluded by *Electronic Industries, supra,* and similar cases from obtaining review. It is the result, based upon evidence that the railroads don't like, not the dictum regarding the "4-R Act," and it is the result based upon evidence that the railroads seek to have reviewed. Viewed in the light most favorable to the railroads, a decision by this Court finding that the Commission's statements with respect to the "4-R Act" are totally in error would not have the effect of reversing the Commission decision which is based entirely upon the evidence of record.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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November 22, 1978